

1 DHAIVAT H. SHAH (S.B. # 196382)  
O'MELVENY & MYERS LLP  
2 2765 Sand Hill Road  
Menlo Park, CA 94025  
3 Telephone: (650) 473-2600  
Facsimile: (650) 473-2601  
4 E-mail dshah@omm.com

5 Attorneys for Defendants VaST SYSTEMS  
TECHNOLOGY CORPORATION; ALAIN  
6 LABAT; KYLE PARK; MDV VII, L.P.; and  
SEVENTH MDV PARTNERS L.L.C.  
7

8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**  
11

12 RYUICHI HIRADE,

13 Plaintiff,

14 v.

15 VaST SYSTEMS TECHNOLOGY  
CORPORATION; ALAIN LABAT and  
16 KYLE PARK; MDV VII, L.P., as Nominee  
for MDV VII, L.P., MDV VII LEADERS  
17 FUND, L.P., MDV ENTREPRENEURS  
NETWORK FUND VII (A) L.P., and  
18 MDV ENTREPRENEURS NETWORK  
FUND VII (B) L.P., MDV PARTNERS  
19 L.L.C.; and SEVENTH MDV PARTNERS  
L.L.C.

20 Defendants.  
21

Case No. C08-04714 RMW (PVT)

**REPLY IN SUPPORT OF MOTION TO  
REQUIRE PLAINTIFF TO FURNISH  
SECURITY FOR COSTS**

Date: May 8, 2009

Time: 9:00 a.m.

Judge: Hon. Ronald M. Whyte

Courtroom: 6, 4th Floor

22  
23  
24  
25  
26  
27  
28  
**REPLY ISO MOTION TO REQ.  
PLAINTIFF TO FURNISH SECURITY  
FOR COSTS**

1 **I. INTRODUCTION**

2 Defendants respectfully request, pursuant to Local Rule 65.1-1, that plaintiff be required  
3 to furnish security for costs in the amount of \$150,000. As shown in Defendants' Motion to  
4 Furnish Security For Costs ("Motion"), it is appropriate to require plaintiff to furnish security  
5 because plaintiff does not reside in California and because defendants have a reasonable  
6 possibility of succeeding on the merits.

7 Under California Code of Civil Procedure § 1030, a foreign plaintiff should be required to  
8 furnish security for costs if there is a "reasonable possibility" defendants will prevail on the  
9 merits. The Motion shows why that is the case here. Plaintiff's Memorandum in Opposition  
10 ("Opposition Brief or Opp. Br.") attacks this request in a number of ways.

11 First, the Opposition Brief argues that the Court's authority to require security is found in  
12 Local Rule 65.1-1, not California Code of Civil Procedure § 1030. That is undoubtedly true. But  
13 Local Rule 65.1-1, like similar local rules in many jurisdictions, is entirely silent on how this  
14 Court should exercise its discretion. This is why federal courts have traditionally looked to the  
15 law of the forum state for guidance, in this case California Code of Civil Procedure § 1030.

16 Second, the Opposition Brief argues that plaintiff owns shares of VaST that can serve as  
17 security. But plaintiff offers no mechanism under which defendants may readily collect against  
18 his shares after the Court issues a costs and fee award.

19 Third, it argues that only VaST may obtain security and only for plaintiff's contractual  
20 claims. This is not correct. Although the attorney's fees that VaST will be entitled to from any of  
21 plaintiff's claims arising from the contract will be the largest component of a costs and fee award,  
22 defendants are also entitled to recover their costs for all of the claims asserted against them under  
23 Rule 54(d) of the Federal Rules of Civil Procedure.

24 Fourth, it argues that defendants do not have a reasonable possibility of prevailing on the  
25 merits. For all of the reasons stated in the Motion, as well as the in Defendants' Motion to  
26 Dismiss, these arguments are without merit.

27 Fifth, the Opposition Brief argues that the requested security of \$150,000 is unreasonable.  
28 To the contrary, the requested security reflects only a portion of the expected costs and fee award

1 in this case. Defendants respectfully request that this Court provide them protection so that they  
 2 can be certain to receive at least a portion of their costs and fees in the event that the plaintiff  
 3 chooses not to comply with a costs and fee award issued by this Court after judgment is entered.

4 **II. CALIFORNIA CODE OF CIVIL PROCEDURE § 1030 GUIDES THIS COURT'S**  
 5 **DISCRETION**

6 Local Rule 65.1-1 authorizes this Court to order plaintiff to furnish security for costs.  
 7 This local rule, like similar local rules of federal courts around the country, is silent on what  
 8 standards the Court should apply to evaluate whether it should require security from a foreign  
 9 plaintiff. It is for this reason that “[t]ypically federal courts, either by rule or by case-to-case  
 10 determination, follow the forum state’s practice with regard to security for costs, as they did prior  
 11 to the federal rules; this is especially common when a non-resident party is involved.” *Simulnet*  
 12 *East Assocs. v. Ramada Hotel Operating Co.*, 37 F.3d 573, 574 (9th Cir. 1994) (quoting 10  
 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2671 (3d ed. 1998)).

14 Thus, it is appropriate for this Court to look to Section 1030 of the California Code of  
 15 Civil Procedure for guidance on how it should exercise its discretion. Under this section, courts  
 16 “shall” require a foreign plaintiff to furnish security for costs where there is a “reasonable  
 17 possibility” that the defendants will defeat the plaintiff’s claims. Cal. Civ. Proc. Code § 1030(b)-  
 18 (c).

19 The Opposition Brief attempts to escape the relevant standard by arguing that this Court  
 20 should not look to California law for guidance. Opp. Br. 3:14-4:2. It cites to *Trophy*  
 21 *Productions, Inc. v. Sperling*, 17 F.R.D. 416, 419-20 (S.D. Cal. 1955), where a district court  
 22 concluded that it could not require a foreign plaintiff to furnish security because such relief was  
 23 not authorized by local rule or the Federal Rules of Civil Procedure. But as the Ninth Circuit has  
 24 subsequently made clear, whether under local rule or their inherent powers, federal courts are  
 25 authorized to require foreign plaintiffs to furnish security for costs and they should apply the law  
 26 of the forum state to determine when security should be required. *Simulnet*, 37 F.3d at 574.  
 27 Therefore, Section 1030 of the California Code of Civil Procedure provides the appropriate  
 28 standard that should be applied in this Motion.

1 **III. PLANTIFF HAS NOT IDENTIFIED ANY ALTERNATIVE MEANS OF**  
 2 **PROTECTION OF DEFENDANTS' INTERESTS ABSENT A BOND**

3 This Motion is the only means by which defendants can obtain some level of assurance  
 4 that if they prevail in this action plaintiff will repay at least a portion of any costs and fee award.  
 5 Prior to filing this Motion, defendants wrote to plaintiff to ask that he identify any property in  
 6 California that could be used to satisfy a costs and fee award. Declaration of Dhaivat H. Shah In  
 7 Support Of Defendants' Motion To Require Plaintiff To Furnish Security For Costs, filed April 3,  
 8 2009, ¶7 & Ex. B. Plaintiff did not respond. Plaintiff likewise failed to identify any California  
 9 property in his Opposition Brief.

10 The Opposition Brief contends that plaintiff's shares of VaST could serve as security.  
 11 Opp. Br. 4:8-16. But the Opposition Brief is silent on how defendants could readily recover  
 12 against those shares to satisfy a costs and fee award. Absent any property that is subject to the  
 13 jurisdiction of this Court, requiring plaintiff to furnish security is the only means of protecting  
 14 defendants' legitimate interest in recovering their costs.

15 **IV. DEFENDANTS HAVE A REASONABLE POSSIBILITY OF PREVAILING IN**  
 16 **THIS SUIT**

17 For the reasons stated in Defendants' Motion to Dismiss, Defendants' Reply to Plaintiff's  
 18 Opposition to Defendants' Motion to Dismiss, and Defendant's Motion to Furnish Security for  
 19 Cost, defendants have a "reasonable possibility" of prevailing in this action. Therefore, plaintiff  
 20 should be required to furnish security for costs.

21 **V. ALL OF THE DEFENDANTS ARE ENTITLED TO REQUEST SECURITY FOR**  
 22 **COSTS ARISING FROM EACH OF PLAINTIFF'S CLAIMS**

23 It is undisputed that VaST is entitled to its attorneys fees if it is the prevailing party on any  
 24 claims arising from the contract. Rule 54(d) of the Federal Rules of Civil Procedure also entitles  
 25 all of the defendants to recover their costs from defending against all of the claims brought by  
 26 Plaintiff. Therefore, the Opposition Brief's assertion that the Motion should only have been  
 27 brought on behalf of VaST and only in connection with plaintiff's contractual claims is without  
 28 merit.

1 **VI. SECURITY IN THE AMOUNT OF \$150,000 IS MEASURED AND REASONABLE**

2 The Motion seeks security in the amount of \$150,000 and is supported by a detailed  
3 estimate of counsel for all fees and costs arising through trial. This sum reflects a conservative  
4 estimate of the exposure that defendants face and is calculated to strike a balance between  
5 defendants' need for protection and plaintiff's right of access to the courts.

6 The Opposition Brief argues that the estimates provided in the supporting declaration of  
7 defendants' counsel are "spurious," but offers no analysis of why defendants' counsel's good  
8 faith estimates are unreasonable. Opp. Br. 7:1-2. In fact, defendants respectfully submit that the  
9 supporting declaration contains an in-depth and thorough look at likely attorney's fees and costs  
10 through trial.

11 The Opposition Brief argues that defendants retained "one of the country's most  
12 expensive firms," and makes unsupported statements that it believes the case is being  
13 "overlawyer[ed]." Opp. Br. 2:27, 6:14. It is not for plaintiff to dictate what kind of firm  
14 defendants choose to retain, especially in light of the serious accusations plaintiff has made  
15 against VaST's management in public filings.

16 The Opposition Brief also faults defendants for failing to show how fees and costs should  
17 be allocated between the contractual and non-contractual claims. Notably, plaintiff does not do  
18 so either. Defendants note that at least three of plaintiff's six claims (breach of contract, breach  
19 of implied covenant of good faith and fair dealing, and declaratory relief) are certainly subject to  
20 the fee-shifting provisions of the contract. The prevailing party in this action may ultimately  
21 argue that some of the other claims also arise from the interpretation of the contract. Rather than  
22 require a ruling on allocation at this juncture, defendants asked for a modest allocation that no one  
23 could reasonably argue with. Specifically, of the \$150,000 requested, \$31,850 reflect the portion  
24 to be allocated to costs. The remaining portion of the requested security, \$118,150, reflects  
25 approximately 8% of the estimated \$1,493,395 in legal fees defendants expect to spend through  
26 trial. If plaintiff considers 8% to be overreaching, it is clear that no allocation will satisfy him.

27 Plaintiff may quibble with the total estimate provided in defendants' counsel's  
28 declaration. But defendants have only asked for a small portion of their estimated fees. Given

1 their potential exposure, defendants respectfully submit that plaintiff should be required to furnish  
2 the measured and reasonable security they have requested. In the event that the Court concludes  
3 that a smaller security is appropriate, defendants urge this Court to provide some amount of  
4 security so that they can be assured of recovering a portion of their fees and costs should they  
5 prevail in this action.

6 **VII. CONCLUSION**

7 For the reasons stated above, defendants respectfully request that plaintiff be ordered to  
8 furnish security for costs in the amount of \$150,000, or such lesser amount deemed appropriate  
9 by the Court.

10  
11 Dated: April 24, 2009

DHAIVAT H. SHAH  
O'MELVENY & MYERS LLP

12  
13  
14 By: /s/ Dhaivat H. Shah

Dhaivat H. Shah  
Attorneys for Defendants  
VaST SYSTEMS TECHNOLOGY  
CORPORATION; ALAIN LABAT; KYLE  
PARK; MDV VII, L.P.; and SEVENTH MDV  
PARTNERS L.L.C.

15  
16  
17  
18  
19  
20 MP1:1176115.1